

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:SER:IDD:IND:TL-N-4122-99  
RTJordan

date: **JUL** 9 1999

to: Chief, Examination Division, Indiana District  
Staff Assistant Pat Shaffner and Revenue Agent Teresa Tramm

from: RONALD T. JORDAN  
Special Litigation Attorney

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subject: RRA 98 Innocent Spouse Cases  
Addressing Potential Conflicts of Interest

This memorandum is in response to your request for advice concerning the following issue:

ISSUE

How should the Service respond to potential conflicts of interest inherent in innocent spouse cases when the same recognized representative represents both husband and wife?

CONCLUSION

As discussed below, the agent handling the innocent spouse examination should obtain written assurance from the representative that the potential conflict of interest has been discussed with the husband and wife and that neither party objects to continuing the dual representation.

DISCUSSION

The new innocent spouse provisions enacted in RRA 98 have resulted in a major influx of innocent spouse appeals. In many cases, the same recognized representative that represented both husband and wife during the examination of the tax return continues to represent the spouse claiming innocent spouse status during the investigation of the innocent spouse claim. This creates a conflict of interest. The conflict of interest arises because the recognized representative has a fiduciary obligation to both the husband and wife. Since the innocent spouse claim could result in a shifting of liability from one spouse to another, the representative may be influenced to favor the interests of one spouse over the other.

The Service could be adversely affected by the potential conflict of interest. The most significant problem is that any agreement entered into by the representative could be collaterally attacked as a violation of the representative's fiduciary obligations. A successful collateral attack on an agreement would make the agreement void, and would require the Service to devote additional resources to resolve the innocent spouse claim with another representative.

What should the Service do when it is confronted in an innocent spouse case with a potential conflict of interest? Treasury Department Circular No. 230, § 10.29, addresses potential conflicts of interest. It states that "no attorney, certified public accountant or enrolled agent shall represent conflicting interests in his practice before the Internal Revenue Service, except by express consent of all directly interested parties after full disclosure has been made." In order to verify that the recognized representative has complied with section 10.29 of Circular 230, I recommend that a letter be sent to the representative seeking written assurance that (1) he has notified husband and wife taxpayers of the potential conflict of interest inherent in such a dual representation and (2) neither spouse objects to his representation. Such a letter could take the following form:

Dear Sir/Madam:

You have asserted in a recent request for innocent spouse relief that (claimed innocent spouse) is entitled to relief from liability for a joint income tax liability for the year(s) 19XX. It has come to our attention that you also represent Mr. and Mrs. (Taxpayers) in the administrative proceeding involving determination of the subject income tax liability. Because the issue in the current administrative proceeding is one of shifting the tax liability from one spouse to another, both of whom you represent, it could appear that your representation in both proceedings (dual representation) presents a conflict of interest.

As you are aware, Treasury Department Circular No. 230, § 10.29, prohibits recognized representatives from representing conflicting interests in his/her practice. By bringing this matter to your attention, we are not suggesting that you have acted improperly. We only desire assurance that any resolution of the innocent spouse claim is not collaterally attacked on the grounds of a conflict of interest.

To provide such assurance, as soon as possible please discuss the matter of the potential conflict of interest with both husband and wife and obtain both parties' express consent to such dual representation. In addition, please respond to the undersigned in writing that the matter of the potential conflict of interest has been discussed with husband and wife and that they consent to the dual representation.

In addition, it may be advisable to set forth a requested response date so that the progress of the case is not unduly delayed. If no response is received from the recognized representative within a reasonable time, I recommend that you contact District Counsel for further advice.

In answer to other questions posed by Revenue Agent Tramm:

1. A separate power of attorney form need not be obtained from the recognized representative if you are advised by the representative that the spouses consent to the representation per the above. If consent is not granted, a new representative must be appointed if a representative is desired.
2. If continued representation is authorized by husband and wife, then correspondence relating to either party may be sent to the recognized representative.

If you have any further questions, please contact me at Ext. 6610.

(signed) RONALD T. JORDAN

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RONALD T. JORDAN  
Special Litigation Attorney

CC: Ross Springer, District Counsel  
CC: Roy Allison, Assistant Regional Counsel (TL)  
CC: Assistant Chief Counsel (Field Service)